Supreme Court, U.S.
FILED
DEC 26 1991
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(5)

No. 91-159

In The

Supreme Court of the United States

October Term, 1991

IN RE ALAN J. AND MARY FRANCES ANTWEIL, husband and wife, HOBBS PIPE & SUPPLY, a general partnership, and MORRIS R. ANTWEIL,

Debtors.

WILLIAM BARNHILL,

Petitioner,

v.

ELLIOTT JOHNSON, Trustee,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENT

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JURISDICTIONAL STATEMENT

Petitioner's Jurisdictional Statement is accurate but incomplete. Brief of Petitioner at 1-2. In addition to the jurisdictional facts noted by Petitioner, it should be added that Respondent was appointed Trustee in Bankruptcy of the Chapter 11 Bankruptcy Estates of Alan and May Frances Antweil, Morris R. Antweil and Hobbs Pipe and Supply, a general partnership of Alan J. and Morris R. Antweil, on May 15, 1986 which appointment Respondent accepted on June 3, 1986. (J.A. 1).

STATUTES INVOLVED

In addition to the statutory provisions set forth by Petitioner, this case involves the provisions of 11 U.S.C. § 547(e) which provides as follows:

11 U.S.C. § 547

. . .

(e)(1) For purposes of this section –

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire

a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made –

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

Also, while the definition of "transfer" as found in U.S.C. § 101 has not changed, it was codified at 11 U.S.C. § 101(48) on February 18, 1986. In subsequent redesignations, it later became one of the two definitions presently identified as 11 U.S.C. § 101(54).[1] Other than this minor

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[1] In 1990, Congress added eight new definitions to 11 U.S.C. § 101 in two separate acts, Pub. L. Nos. 101-311 and

(Continued on following page)

matter, the question of which version of the Bankruptcy Code may be applicable does not appear to be significant since there have been no amendments to any relevant provision between 1986 and the present.

STATEMENT OF THE CASE

Alan J. and Mary Frances Antweil, Morris R. Antweil, and Hobbs Pipe and Supply, a general partnership of Alan J. and Morris R. Antweil, ("the Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on February 18, 1986 in the United States Bankruptcy Court for the District of New Mexico. (J.A. 1). The Respondent, Elliott Johnson ("the Trustee"), was appointed Chapter 11 Trustee in Bankruptcy of the Debtors' jointly administered estates on May 15, 1986, and accepted this appointment on June 3, 1986. (J.A. 1). A consolidated Chapter 11 Plan for the Debtors' estates was confirmed by the Bankruptcy Court on May 6, 1988. (J.A. 1).

On May 12, 1988, the Trustee brought an adversary proceeding against certain defendants, including Petitioner William Barnhill ("Petitioner"), by filing a Complaint to Recover Preferential Transfers. (J.A. 1). In the count of the complaint applicable to the Petitioner, the Trustee sought to avoid as preferential a transfer made to

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(Continued from previous page)

101-647. The interaction between those two acts resulted in the definitions of "stockbroker" and "transfer" both being identified by 11 U.S.C. § 101(54).

the Petitioner in the amount of $157,148.22 by check dated November 19, 1985. (J.A. 6, Paras. 5 and 6). The other Defendants are not parties to the proceedings on appeal and the Trustee's claims against them are not at issue.

On June 17, 1988, Petitioner filed a Motion to Dismiss the Trustee's complaint against him contending that the Complaint failed to state a claim upon which relief could be granted and that the Bankruptcy Court lacked subject matter jurisdiction over the property. (J.A. 16-17). On October 6, 1988, with leave of the Bankruptcy Court, the Trustee filed a First Amended Complaint to Recover Preferential Transfers which did not alter his allegations against the Petitioner. (J.A. 1, 19-29).

On October 11, 1988, the Trustee filed a Motion for Leave to File Second Amended Complaint to Recover Preferential Transfers with the proposed Second Amended Complaint attached as an exhibit to the Motion. (J.A. 2, 30-40). In his Motion, the Trustee alleged that he had reexamined certain evidence and believed that the evidence provided a basis for asserting, against the Petitioner, an alternative transfer date of November 20, 1985. (J.A. 31, Para. 1). In the proposed Second Amended Complaint, the Trustee alleged that the check at issue was delivered to Petitioner on November 18, 1985, dated November 19, 1985, and honored by the drawee bank on November 20, 1985. (J.A. 36, Para. 7). In proposing these amendments, the Trustee assumed that November 20, 1985 was the 90th day before the filing of

Debtors' petitions.[2] The Trustee reasoned that November 20, 1985 was the date of transfer since under Section 547(b)(4) transfer occurs upon honor for all checks or, alternatively, for post-dated checks.

Petitioner filed an Objection to the Trustee's Motion on October 13, 1988. (J.A. 2). Petitioner contended that the transfer occurred either on November 18 or 19, 1985 and, regardless of which of the two dates were used, the Trustee could not avoid the transfer. (J.A. 42). Also on October 13, 1988, Petitioner filed a second Motion to Dismiss directed at the First Amended Complaint. (J.A. 2). The grounds advanced by Petitioner for dismissal remained the same. At no time has Petitioner filed an answer or any other pleading which alleged that one of the Section 547(c) exceptions is relevant to the Trustee's action against him.

On March 1, 1989, the Bankruptcy Court entered its order denying the Trustee's Motion for leave to file his proposed Second Amended Complaint and granted Petitioner's Motions to Dismiss. (J.A. 49, 51). Accompanying the Bankruptcy Court's order was its Memorandum Opinion. (App. C to Petition at 24a). The Bankruptcy Court opined that the Tenth Circuit's decision in *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th

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[2] In the proceedings below, there was a dispute as to what date was the 90th day prior to the filing of Debtors' petitions. However, that issue was not pursued beyond the District Court. Based upon the District Court's ruling, the parties agree that November 20, 1985 is the 90th day before the date of the filing of the petitions for purposes of Section 547(b)(4)(A). *See* (App. B to Petition at 13a-14a, n. 1) (briefly describing the history of this issue).

Cir. 1986), was controlling so that the date a check is delivered is the date of transfer for purposes of Section 547(b)(4). (App. C to Petition at 26a-27a). Additionally, the Bankruptcy Court held that a transfer by check occurs on the date a check is received or is dated, whichever is later. (*Id.* at 26a).

On March 10, 1989, the Trustee appealed the decisions by the Bankruptcy Court to the United States District Court for the District of New Mexico. (J.A. 2). The District Court affirmed the rulings of the Bankruptcy Court in its Memorandum Opinion and Order entered on February 27, 1990. On the Question Presented for Review in this case, the District Court found the Tenth Circuit's reasoning in *Bernstein v. RJL Leasing, supra*, persuasive and affirmed the adoption of a date of delivery rule for purposes of Section 547(b)(4)(A). (App. B to Petition at 16a-19a). As to the postdated check issue, the District Court held that the date of delivery rule should apply if the parties intended to rely on the check as a cash transaction and went on to find that, given the one day lapses between the date of delivery, the date on the face of the check and the date of honor, the parties intended a cash payment. (*Id.* at 21a-22a).

The Trustee filed a Notice of Appeal as to the District Court's decision on March 29, 1990. (J.A. 3). In addition to the two theories raised at the Bankruptcy Court and the District Court, the Trustee also appealed on the ground that the District Court had made an impermissible finding of fact regarding the intent of the parties to create a cash transaction since no evidence was ever presented regarding the intent of the parties or any other issue. On April 30, 1991, the United States Court of Appeals for the

Tenth Circuit filed its Opinion in which it concluded that the date of honor was the date of transfer for purposes of Section 547(b)(4). This decision rendered moot the issues raised in the Trustee's appeal relating to post-dated checks, which issues are not now before this Court. *See* Respondent's Brief in Opposition at 3.

SUMMARY OF THE ARGUMENT

In support of his contention that the decision of the Tenth Circuit should be overturned, Petitioner advances three principal rationale: the date of delivery approach is endorsed by the legislative history; that approach is consistent with the definition of "transfer" found in the Bankruptcy Code; and, the date of honor approach is inconsistent with congressional policy of creating a preference section which conforms to commercial practice. Petitioner's position ignores the express provisions of Section 547. The plain language of both subsection (b) and subsection (e), together with reference to applicable state law, confirms the Tenth Circuit's decision that a transfer by check occurs when the check is honored for purposes of Section 547(b).

Reference to the legislative history is unnecessary. The language of subsections (b) and (e) is unambiguous. Additionally, the legislative history relied upon by Petitioner does not pertain to Section 547(b), but instead is expressly limited to certain of the preference exceptions found in subsection (c).

A stated policy behind Section 547 was to bring preference law more into conformity with the Uniform

Commercial Code ("the U.C.C.") and commercial practice. The U.C.C. clearly supports a date of honor approach, while commercial practice, taken in a light most favorable to Petitioner, does not clearly favor either approach. To the extent some commercial practice supports a date of delivery rule, effectuation of the policy of conforming the preference statute to such commercial practice is best left to the subsection (c) exceptions. Utilizing a date of honor approach under subsection (b) is the only way to avoid a needless conflict between the policies underlying the preference statute.

ARGUMENT

It is undisputed that the primary policy of the Bankruptcy Code is to promote equality of distribution among creditors. *Begier v. Internal Revenue Service*, ___ U.S. ___, 110 S.Ct. 2258, 2262 (1990) (hereinafter cited as "*Begier*"). In order to further that end, Congress enacted the preference provision by which a trustee in bankruptcy can compel disgorgement of property transferred by the debtor to persons who are not insiders on or within 90 days before the filing of the debtor's bankruptcy petition. *Id.* at 2263; 11 U.S.C. § 547(b). The recapture of such property by a trustee enhances the value of the estate for all of the creditors.

In order to so recover a transfer, a trustee must establish all of the elements of Section 547(b). 11 U.S.C. § 547(g). Additionally, even if a trustee has discharged his burden under Section 547(b), he may not avoid a transfer if the creditor or party from whom recovery is sought

establishes all of the elements of one of the seven exceptions enumerated in Section 547(c). *Id.* at (g).

In order to ensure use of the preference avoidance power in a manner best designed to effectuate equality of distribution and economical utilization of the resources of a debtor's estate, Congress restricted a trustee's preference avoidance powers to transfers "of an interest of the debtor in property." 11 U.S.C. § 547(b). Thus, a trustee does not have the power to avoid any action which may have the effect of creating a mere claim against the estate. Instead, a trustee only can avoid those transfers of interests in property which actually deplete the estate, the avoidance of which would affirmatively cause assets to be returned to the estate. Once recovered, those assets later would be distributed to the creditors under the priorities set forth in the Bankruptcy Code.

The date a debtor delivers its check[3] to a creditor is immaterial. Instead, equality of distribution is compromised only if and when the drawee bank honors the check thereby resulting in a concomitant reduction in the

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[3] This case involves a debtor who delivered a check drawn on its own account to a creditor. The Trustee does not intend his arguments herein to be understood to apply to situations where a debtor delivers a cashier's check, a certified check, or a third party check (i.e. a check written by another, made payable to the debtor, and endorsed and delivered by the debtor to a creditor). Each such situation might be sufficiently distinguishable from the present case so as to demand another result. Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713, 762-63 n. 266 (1985) (hereinafter cited as "Countryman, *Voidable Preference* at ___").

drawer/debtor's account with the drawee bank.[4] In this case, $157,148.22 ceased to be available for administration in the Debtors' combined estates for the benefit of all creditors and was transferred to or for the benefit of Petitioner on the date the check at issue was honored. Accordingly, the date of honor is the date that an interest of the Debtors in property was transferred for purposes of Section 547(b)(4).

I. ONLY UNDER THE BANKRUPTCY CODE HAVE SOME CIRCUITS HAD DIFFICULTY WITH THE CONCEPT THAT DELIVERY OF A CHECK DOES NOT CONSTITUTE A TRANSFER OR ASSIGNMENT OF FUNDS.

In discussing Circuit authority under the Bankruptcy Code, Petitioner fails to note that in the Ninth Circuit, under Section 547(b) the date of delivery only controls when a check is honored within a "reasonable time." *Kupetz v. Elaine Monroe Associates, Inc. (In re Wolf & Vine)*, 825 F.2d 197, 202 (9th Cir. 1987). In the Ninth Circuit, the delay between delivery and honor "can be no longer than thirty days" and in instances where the delay exceeds

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[4] As the Eighth Circuit has succinctly observed, describing the honor of a check as reducing an account is not entirely accurate: "In fact, drawers have no money in banks. Only bankers have money in banks. Drawers have choses in action against banks." *W.B. Farms v. Fremont National Bank and Trust Co.*, 756 F.2d 663, 666 (8th Cir. 1985). That being said, the Trustee will continue to utilize the more common formulation of account reduction herein as there is no substantive difference if the transfer avoided is from the Debtors' account or is a reduction of Debtors' chose of action against a bank.

thirty days, the date of honor is deemed to be the date of transfer. *Id.* at 202. Otherwise, Petitioner accurately summarizes the conflicting Circuit authority as to the Question Presented. Brief of Petitioner at 10.

Under the former Bankruptcy Act, four Circuits confronted the issue of if and when a preferential transfer occurs when a debtor makes a check and those courts unanimously found that no preferential transfer occurs unless and until the check is honored. *Nicholson v. First Investment Co.*, 705 F.2d 410, 412-13 (11th Cir. 1983); *Klein v. Tabatchnick*, 610 F.2d 1043, 1049 (2d Cir. 1979) (no preference occurred where the debtor delivered a check which was never honored); *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288, 1293 (7th Cir. 1974); *Watchmaker v. Barnes*, 259 F. 783, 788 (1st Cir. 1919) (involving a post-dated check); and, *In re Lyon*, 121 F. 723, 726 (2d Cir. 1903) (involving a post-dated check). *See also, Bass v. Olson*, 378 F.2d 818, 820 (9th Cir. 1967) (possession of an uncashed check is not a payment). *But see, Shamrock Golf Co. v. Richcraft, Inc.*, 680 F.2d 645, 646 (9th Cir. 1982) (indicating in *dicta* that a transfer occurs upon delivery of a check).

Additionally, in other civil proceedings, various Circuits have nearly unanimously found that checks are not transfers of funds unless and until they are accepted by the drawee bank. *See W.B. Farms v. Fremont National Bank and Trust Co., supra*, 756 F.2d at 666 (checks are not assignments of a drawer's funds under Nebraska law); *Port City State Bank v. American National Bank*, 486 F.2d 196, 201 (10th Cir. 1973) (same under Oklahoma law); *Wall v. Mutual Life Insurance Co.*, 467 F.2d 321, 424 (5th Cir. 1972) (delivery of a check is not payment under Georgia law); and, *Duke v. Sun Oil Co.*, 320 F.2d 853, 861 (5th Cir. 1963)

(check is only a conditional payment until honored under Texas law). *But see Engstrom v. Wiley*, 191 F.2d 684, 686 (9th Cir. 1951) (under Washington preference statutes, a check is equivalent of cash and no preference occurs in a cash sale).

The Circuits have also recognized in criminal contexts that the delivery of the check does not constitute payment or transfer or assign any funds of the drawer. *See United States v. $4,255,000*, 762 F.2d 895, 907 (11th Cir. 1985) (in a forfeiture action brought pursuant to Section 511(a)(6) of the Comprehensive Drug Abuse Prevention Control Act of 1970 (21 U.S.C. § 881(a)(6)), holders of checks written on the seized account have no ownership or possessory interest in the seized funds since checks are not assignments); and, *United States v. Forcellati*, 610 F.2d 25, 31 (1st Cir. 1979) (defendant guilty of a misdemeanor of disposing of property of the United States when he intercepted a Treasury check payable to a third party from the mail and cashed it since funds remained property of the government).

II. THE UNAMBIGUOUS LANGUAGE OF SECTION 547 REQUIRES THE UTILIZATION OF A DATE OF HONOR RULE.

The unambiguous provisions of Section 547 together with applicable state law in the form of the U.C.C, make clear that a transfer by check takes place for purposes of Section 547(b) if and when the check is honored.

A. SECTION 547(b) DOES NOT, BY ITSELF, DEFINE WHEN A TRANSFER IS MADE.

Subject to the provisions of Section 547(c) and to a trustee's satisfactory discharge of his burden of proof on the other four elements of a preferential transfer, "the Trustee may avoid any transfer of an interest of the debtor in property made on or within 90 days before the date of the filing of the Petition." 11 U.S.C. § 547(b)(4)(A). Thus, where a debtor delivers a check to another, the issue becomes when the transfer of an interest of the debtor in property is "made."

B. SECTION 547(e) AND APPLICABLE STATE LAW DEFINE WHEN AN AVOIDABLE TRANSFER IS "MADE."

Section 547(e), by its express, unambiguous terms, defines when a transfer of an interest of the debtor in property "is made" for purposes of Section 547. In so defining, Section 547(e) requires reference to state law.

1. SECTION 547(e) DOES NOT FULLY ANSWER THE QUESTION PRESENTED.

There are three conceivable dates of transfer in this case: November 18, 1985, which is the date of delivery; November 19, 1985, which is the date appearing on the face of the check; and, November 20, 1985, which is the date of honor. Given that the parties agree that the transfer was "made" prior to the filing of the Debtors' petitions, Section 547 answers the question of when a transfer is made as follows:

> For purposes of this section, except as provided in Paragraph (3) of this subsection, a transfer is made –
>
> (A) at the time such transfer takes affect between the transferor and the transferee, if such transfer is perfected at, or within ten days after, such time; [or,]
>
> (B) at such time such transfer is perfected, if such transfer is perfected after such ten days; . . .

11 U.S.C. § 547(e)(2).[5] However, rather than completely answering the question, this provision creates two other questions. Specifically, the issues then become: (i) when a transfer by check takes effect between the transferor and the transferee; and, (ii) when such a transfer becomes perfected.

As to the latter question, Section 547(e) provides further direction: "For purposes of this section, a transfer of . . . property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." *Id.* at (e)(1)(B). Thus, the second question emerging from Section 547(e)(2) is refined to being an inquiry of when a creditor on a simple contract cannot acquire a judicial lien

---

[5] Section 547(e)(3) provides that "a transfer is not made until a debtor has acquired rights in the property transferred." Under the date of delivery approach advocated by Petitioner, Paragraph (3) clearly adds the additional area of inquiry of when the debtor "acquired rights" in the funds which were used to pay the check upon honor. If no such rights had been acquired at the time of delivery, the date of delivery cannot control.

to the money in the debtors bank account that is superior to the interest of the payee of the check.

The Bankruptcy Code provides no further guidance regarding the answers to these questions. When confronted with an almost identical problem under the preference provisions of the Bankruptcy Act, this Court determined that Congress intended such issues to be controlled by state law:

> In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of state law. And hence § 60(a)'s 'apparent command is to test the effectiveness of a transfer, as against the Trustee, by the standards which applicable state law would enforce against a good faith purchaser.' *Corn Exch. Nat. Bank & T. Co. v. Klauder*, 318 U.S. 434, 436 . . . Section 60(a) in this respect, as do numerous other federal statutes . . . thus adopts state law as the rule of decision. The state standards which control the effectiveness of a transfer likewise determine the precise time when a transfer is deemed to have been made or perfected.

McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1944) (some citations omitted).

There is no indication in the text of Section 547(e) that Congress intended for a different analysis to be utilized when it adopted the Bankruptcy Code. Indeed, the legislative history appears to confirm that the *McKenzie* approach is still valid and that reference to state law is necessary to complete any analysis under Section 547(e). *See* S. Rep. No. 989, 95th Cong., 2d Sess. 89, *reprinted in* King, *Collier on Bankruptcy*, App. 3 at V-89

(15th ed. 1991) ("Subsection (e) is designed to reach different results under the 1962 version of Article 9 and under the 1972 version . . . ") (hereinafter cited as "S. Rep. No. 989" and "*Collier*" respectively); and, 124 Cong. H 11097 (daily ed. Sept. 28, 1978) (Comments of Rep. Edwards) *reprinted in Collier, supra*, App. 3 at IX-103 (discussing the interaction of Section 547(e)(1)(B) and bulk sales law). Accordingly, one must refer to state law in order to answer the questions of when a transfer by check takes effect between the drawer and the payee and when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the payee in the check.

2. UNDER STATE LAW, THE TRANSFER OF AN INTEREST OF THE DEBTOR IN PROPERTY TAKES PLACE WHEN THE CHECK IS HONORED.

In each of the states, the law of negotiable instruments, including checks, is governed by Article 3 of the U.C.C.[6]

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[6] There is neither any stipulation in the record nor sufficient facts alleged in the Trustee's Second Amended Complaint for this Court to determine which state's law would apply in this case. However, the Trustee does not believe that any such determination is necessary. All fifty states have adopted Article 3 of the U.C.C. and there does not appear to be any material deviation among the several states from the uniform provisions of Article 3 discussed herein. For instance, all fifty states, the District of Columbia, Guam and the Virgin Islands have adopted the uniform version of Section 3-409(1), which is the

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Under state law, a check is a writing that: is signed by the drawer; contains an unconditional order to pay a sum certain in money and in which no other promise, order, obligation or power is given by the drawer except as authorized by Article 3; is payable on demand;[7] is payable to order or to bearer; and, is drawn on a bank. U.C.C. § 3-104. By delivering a check to a payee, a drawer "only gives the creditor a contingent promise under U.C.C. § 3-413(2) to pay the creditor if the drawee bank does not." Countryman, *Voidable Preference* at 762. Section 3-409(1) clearly states that a drawer does not part with any funds by delivering a check: "A check . . . does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." Acceptance of a check only can occur under Section 3-410 by

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controlling provision in this case. U.C.C. (2A U.L.A.) (West 1991) at 1-2 and at § 3-409. Apparently no state has adopted Revised Article 3, which was approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute in 1990, under which § 3-409(1) is merely redesignated as § 3-408. U.C.C. (2 U.L.A.) (West 1991) at § 3-408.

[7] While the Trustee believes that the issues are not before this Court (*see* Respondent's Brief in Opposition at 3), it should be noted that this requirement renders the term "post-dated check" an oxymoron. Specifically, a check which is post-dated is not payable until its stated date. U.C.C. § 3-114(2). "[A] check post-dated by even one day" is "a credit instrument." Official Comment to U.C.C. § 2-511 at ¶ 6. Thus, even if this Court reverses the decision of the Tenth Circuit and holds that a check is transferred upon delivery for purposes of Section 547(b), there remain issues on appeal to be ruled upon by the Tenth Circuit since a "post-dated check" is not a check.

"the drawee's signed engagement to honor the draft as presented" or under Section 4-302 where the drawee bank fails to timely dishonor the instrument.

As to the issue of perfection, under applicable state law it is quite clear that prior to the drawee honoring the check a creditor can obtain a lien superior to the claim of the payee. The case of *Gelco Corp. v. United National Bank*, 569 So.2d 502 (Fla. Dist. Ct. App. 1990), which involved a prejudgment writ of garnishment, is quite illustrative. In that case, a writ of garnishment was served on the drawee bank six days after a check had been delivered to the payee and on the same day that the check was presented to the drawee bank for payment, but prior to drawee's acceptance. *Id.* at 503. The bank's dishonor of the check in favor of the garnishor was held to be appropriate since a check does not operate as an assignment of funds in law or equity. *Id.* at 503-04, citing § 673.409(1) Fla. Stat. (1989) (Florida's codification of U.C.C. § 3-409(1)). *See also* U.C.C. § 4-303(1) (delineating when a drawee bank must refuse to honor checks drawn on a customer's account after receiving legal process).

Courts applying the Section 547(e) requirements to transfers by check have apparently not had any difficulty with the concept that the transfer is "perfected" upon the acceptance of honor of the check by the drawee bank. *See e.g., Tidwell v. Atlanta Gas Light Co. (Matter of Georgia Steel, Inc.)*, 38 Bankr. 829, 833 (Bankr. M.D. Ga. 1984); and, *Eisenberg v. J L International, Ltd. (In re Sider Ventures & Services Corp.)*, 47 Bankr. 406, 407 (S.D.N.Y. 1985). Instead, differences exist between those courts since some courts erroneously believe that the time that such transfer "takes effect between the transferor and the transferee" is when

the check is delivered. *Compare Dickenson v. Owens-Corning Fiberglass Corp. (In re Insulation Materials, Inc.)*, 47 Bankr. 832, 834-35 (Bankr. E.D. Tenn. 1985); with, *Eisenberg v. J L International, Ltd., supra*, 47 Bankr. at 407. However, there is no time earlier than the time of honor at which the transfer takes effect since, as Section 3-409(1) of the U.C.C. clearly provides, no legal or equitable assignment of funds in the hands of the drawee is made by delivery of a check. *See also*, Countryman, *Voidable Preference*, at 762-63; and, Official Comment to U.C.C. § 3-409 at ¶1 ("a check . . . does not of itself operate as an assignment in law or equity").

Since the date the transfer takes effect between the transferor and transferee and the date of perfection are the same in cases of transfers by check, namely, the date the check is honored, the transfer is made for Section 547(b) purposes upon the date of honor. 11 U.S.C. § 547(e)(2)(A).

3. THE SECTION 547(e) ANALYSIS IS NOT LIMITED TO LIENS AND SECURITY INTERESTS.

Although there is disagreement as to the result reached by applying Section 547(e) to the Question Presented, both parties agree that Section 547(e) is controlling. *See* Brief of Petitioner at 15-16. As Petitioner correctly notes, many courts have dismissed Section 547(e) as being merely applicable to security interests based upon, among other things, their reading of the legislative history. *See, e.g., Durham v. Smith Metal and Iron*

Co. (In re Continental Commodities, Inc.), 841 F.2d 527, 530 (4th Cir. 1988), citing S. Rep. No. 989, *supra*, at 89.

As discussed above, the clear, unequivocal language of Section 547(e)(2) declares that it defines when a transfer is made "for purposes" of Section 547. There is no ambiguity in that provision. Accordingly, in interpreting Section 547(e) reference to the legislative history is unnecessary. *Toibb v. Radloff*, ___ U.S. ___, 111 S.Ct. 2197, 2200 (1991), citing *Blum v. Stenson*, 465 U.S. 886, 896 (1984). However, if anything, the legislative history actually supports the application of Section 547(e) to this analysis. The first sentence of Senate Report 989 regarding Section 547(e) states that "[s]ubsection (e) determines when a transfer is made for purposes of the preference section." S. Rep. No. 989, *supra*, at 89, *reprinted in Collier, supra*, App. 3 at V-89.

The Fourth Circuit and other courts misread the last provision in that legislative history relating to subsection (e), which provides:

> Subsection (e) is designed to reach a different result under the 1962 version of Article 9 of the U.C.C. and under the 1972 version because different actions are required under each version in order to make a security agreement effective between the parties.

Id. Those courts construe this provision to limit the application of Section 547(e)(1)(b) to security interests. *See Durham v. Smith Metal and Iron Co., supra*, 841 F.2d at 530. This view clearly ignores the analytical process mandated in Section 547(e) (i.e. beginning under 547(e)(2), proceeding to (e)(1) and, as appropriate, referring to (e)(3)). Additionally, this provision of the legislative history does

not exclude other types of transfers from subsection (e). Instead, it simply clarifies that the Senate actually intended different results under subsection (e) depending upon which version of Article 9 of the U.C.C. is applied.

C. THE EXPRESS PROVISIONS OF SECTION 547(b) AND APPLICABLE STATE LAW DEMAND THAT THE DATE OF HONOR BE RECOGNIZED AS THE DATE A TRANSFER BY CHECK IS MADE.

Subject to limitations not relevant to this case, a trustee is entitled to avoid as a preference "any transfer of an interest of the debtor in property made on or within 90 days before the date of filing of the petitioner." 11 U.S.C. § 547(b)(4). Petitioner addresses this provision by arguing that, under the broad definition of "transfer" contained in the Bankruptcy Code, the delivery of a check creates a conditional cause of action against the drawer upon delivery, so that a transfer, however conditional, has been effectuated. Brief of Petitioner at 17-18 and 20-22. Petitioner concludes:

> Requiring that the check be honored by the drawee bank before a transfer will be deemed to have occurred requires that the transfer be absolute. The date of honor rule, then, effectively reads a limitation into the definition of 'transfer' contrary to express legislative intent to remove all limiting language from the definition of transfer in the Bankruptcy Code.

Id. at 22. The Trustee concedes that the definition of "transfer" as found in the Bankruptcy Code is expansive.

See id. at 21. However, that definition is not dispositive of this case.

Utilizing only this broad definition of transfer, the delivery of a check on or within 90 days of the bankruptcy filing probably would constitute a preference since, pursuant to state law, that delivery creates a contingent cause of action against the drawer. U.C.C. § 3-413(2). However, the reach of Section 547(b) is expressly limited to transfers of "an interest of the debtor in property." *Begier, supra,* 110 S.Ct. at 2263.[8] Thus, Congress has limited the application of the definition of transfer within Section 547.

In *Begier,* this Court determined that this limiting language in Section 547(b) is "coextensive with 'interest of the debtor in property' as that term is used in § 541(a)(1)." 110 S.Ct. at 2263, n. 3. Thus, in order to determine the extent of this limitation, this Court concluded that "we must turn to § 541, which delineates the scope of 'property of the estate' and serves as the post-petition analog to § 547(b)'s ['interest of the debtor in property']." *Id.* at 2263. The clear command of Section 547(b) is to determine what interests in property a debtor held at the beginning of the 90th day prior to the filing of the bankruptcy petition and what property he acquired within that 90 day period, and to then scrutinize all transfers of such interests in property within that time frame as potential preferences.

[8] In *Begier,* this court considered Section 547(b) as it existed prior to the 1984 amendments. In that version of the Bankruptcy Code, Section 547(b) was limited to transfers of "property of the debtor" rather than "an interest of the debtor in property." 110 S. Ct. at 2263. However, this Court also expressly addressed the 1984 amendments which deleted the "property of the estate" language and replaced it with the current "interest of the debtor in property" language. This Court noted approvingly the Senate Report which described this "as a 'clarifying change.'" *Id.* at 2263, n. 3, quoting S. Rep. No. 98-65, p. 81 (1983). As this amendment had the effect of providing mirror language in Section 541(a)(1) and Section 547(b), *Begier* is controlling.

Utilizing Section 541(a) as a model, the relevant interests of the debtor in property would include "all legal or equitable interests of the debtor in property as of the commencement of the" 90 day period immediately preceding the filing of the debtors' bankruptcy petition. *See* 11 U.S.C. § 541(a)(1).[9] This provision is to be construed "as a definition of what is included in the estate, rather than as a limitation." *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 203 (1983).

"Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner v. United States,* 440 U.S. 48, 54 (1979) (footnote omitted). Although *Butner* was decided under the former Bankruptcy Act, it remains persuasive under the Bankruptcy Code since Congress has made no further effort to define the extent of property rights. Indeed, as the legislative history of Section 541 indicates, the Bankruptcy Code retains Bankruptcy Act concepts on this point:

[9] Section 541(a)(1) excludes the items identified in Section 541(b) and (c)(2). There is nothing in the Trustee's proposed Second Amended Complaint, the allegations of which are taken to be true for purposes of this appeal, which would suggest the applicability of any of these exceptions.

> 'The scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of property including tangible or intangible property, causes of action (*See* Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section of the Bankruptcy Act.'

United States v. Whiting Pools, Inc., supra, 462 U.S. at 205 n. 9, quoting H.R. Rep. No. 95-595, p. 367 (1977); S. Rep. No. 95-989, p. 82 (1978).

Until a check is honored, a debtor retains any funds which will be used to pay the check in his account. Upon the filing of a bankruptcy petition, a trustee or debtor-in-possession would clearly have the power to stop payment of all checks drawn on the debtor's bank accounts, thus preserving those funds for the estate. Upon dishonor, the payee would have a claim against the estate based upon either the check, which claim would certainly be a general unsecured claim, or the underlying obligation. U.C.C. § 3-802(1)(b). Thus, in this case, the Debtors clearly had the power under U.C.C. § 4-403 to stop payment on the check at issue between the time of delivery and the time of honor thereby preventing a transfer of interest of the Debtors in property to Petitioner.[10]

However, Petitioner contends that the relevant transfer occurs at delivery since delivery of a check constitutes

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[10] *See also* Official Comment to U.C.C. § 4-303, at ¶ 1 (indicating that the receipt by the drawee of notice that the customer has filed a petition in bankruptcy is "legal process" requiring the drawee to stop payment on all checks drawn on the account).

a transfer within the meaning of Section 101(48). Specifically, Petitioner focuses on the secondary, conditional liability of the drawer in the event of dishonor as creating a transfer in property. *See* Brief of Petitioner at 18, citing U.C.C. § 3-122. This analysis ignores that no interest of the Debtor in property is transferred upon delivery of a check.

Under applicable state law, there are numerous reasons why a check otherwise properly payable which is delivered to a creditor may not be honored so that there are never any funds transferred to the creditor.[11] While delivery of a check may constitute a "transfer" as that term is broadly defined in 11 U.S.C. § 101(48), it cannot constitute an avoidable transfer of the interest of the debtor in property even if delivery occurs in the 90 day preference period since no funds of the debtor have been transferred to the benefit of that creditor.

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[11] Those reasons include: (1) the drawer does not have sufficient funds to cover the check, *Port City State Bank v. American National Bank,* 486 F.2d 196 (10th Cir. 1973); (2) the drawer timely delivered a stop payment order to the drawee, *Ward v. Federal Kemper Insurance Co.,* 62 Md.App. 351, 489 A.2d 91, 94 (1985); (3) the drawer closed the account on which the check is drawn, *id.* at 94; (4) the bank is timely served with a writ of garnishment, *Gelco Corp. v. United National Bank, supra,* and U.C.C. § 4-303; (5) the account is seized in a civil forfeiture action, *United States v. $4,255,000, supra;* (6) one of the drawers dies, *Cirar v. Bank of Hartshorne,* 567 P.2d 96 (Okla. 1977); (7) setoff by the drawee bank, *see* U.C.C. § 4-303; (8) for any other reason deemed sufficient by the drawee, *First American National Bank v. Commerce Union Bank,* 692 S.W.2d 642, 647 (Tenn. Ct. App. 1985); and, (9) for "no reason at all," *id.* at 647.

The mere delivery of a check does not deplete the assets in the estate available to the remaining unsecured creditors. Indeed, it makes no sense to avoid the delivery of a check since, if it is not honored, the check itself merely creates a general unsecured claim in the payee. If a trustee successfully avoided such a "transfer," she would recover no assets for the estate and the payee would still be able to file a general unsecured claim based on the avoided transfer. *See* 11 U.S.C. § 502(d) (providing that the claim of a recipient of a preferential transfer should be disallowed unless the transferee pays the amount or turns over the property subject to avoidance); and, Bankr. R. Pro. 3002(c)(3) (providing that in Chapter 7 and 13 cases, a general unsecured claim "arises in favor of" a person against whom a final judgment avoiding a transfer is taken for the amount avoided and permitting the filing of a proof of claim in that amount for a certain period of time irrespective of the claims bar date).

The demonstrably better view is that, where a check is involved, the transfer of an interest of the debtor in property occurs only when the check is honored. In virtually every context, including Section 547(b), "[t]he delivery of a check is at best of limited functional significance." *United States v. Forcellati, supra,* 610 F.2d at 31 (criminal case). Accordingly, the date of honor is the date on which the avoidable transfer is "made" for purposes of Section 547(b).

III. THE LEGISLATIVE HISTORY RELIED UPON BY PETITIONER IS IRRELEVANT TO THE QUESTION PRESENTED.

The primary reason advanced by Petitioner for overturning the decision of the Tenth Circuit is that legislative

history supposedly supports a date of delivery rule. Brief of Petitioner at 14-15. Petitioner bases his argument on the language of the report of the House Committee on the Judiciary which refers to a check as " 'a credit transaction' " and the later statements of Representative Edwards and Senator DeConcini which supposedly "contradicted" the House Report by indicating that " 'a check is equivalent to a cash payment.' " *Id.* at 14-15 and n. 3; *quoting,* H.R. Rep. No. 595, 95th Cong., 1st Sess. 373, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6329; 124 Cong. Rec. H 11097 (daily ed. Sept. 28, 1978), *reprinted in Collier, supra,* App. 3 at IX-102; and, 125 Cong. Rec. S 17414 (daily ed. Oct. 6, 1978), *reprinted in Collier, supra,* App. 3 at X-29. While Petitioner acknowledges that the statements of Representative Edwards and Senator DeConcini limited the application of the date of delivery rule to Sections 547(c)(1) and (2), he would have this Court extend that rule since "there is nothing in the legislative history indicating congressional intent that a different rule should apply to Section 547(b)." Brief of Petitioner at 15.

First, it is not even necessary to quarrel with Petitioner's interpretation of this legislative history.[12] In

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[12] Professor Countryman, for one, certainly would disagree with the formulation that the floor managers "contradicted" the House Report. He contends that they "attempted to clear up the confusion" created by that Report where it refers to checks as credit transactions, when only post-dated checks create an extension of credit, and the reference to the thirty day period of Section 3-503, which is irrelevant to the issues at hand. Countryman, *Voidable Preference, supra,* at 761. However,

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interpreting statutes, an analysis must begin with a determination of what the statutory language says. *Toibb v. Radloff, supra*, 111 S.Ct. at 2200, *quoting Blum v. Stenson, supra*, 465 U.S. at 896. As is demonstrated above, the language of Section 547 is clear and requires reference to equally clear state law applicable to this issue. "Thus, although a court may appropriately refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here." *Toibb v. Radloff, supra*, 111 S.Ct. at 2200.

Second, where the legislative history can be considered, as in *Toibb*, "the scant history on this precise issue does not express 'clearly expressed legislative inten[t] . . . contrary . . . ' to the plain language of" subsections (b) and (e). *Id.* at 2200, *quoting Consumer Product Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980).

The only "clearly expressed" legislative intent is with respect to Section 547(c)(1) and (2), which provisions are not at issue in this appeal. Representative Edwards and Senator DeConcini expressly limited their comments to those two paragraphs.[13] The statement in the House

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these comments "only compounded [the confusion] and extended it also to Section 547(c)(2)." *Id.* Petitioner's citation to this article in support of the transfer on delivery rule is perplexing given Professor Countryman's critical tone and conclusion that "the transfer occurs when and if the drawee bank honors the check." *Id.*

[13] Indeed this limitation also can be implied from this legislative history. The comments of Representative Edwards and Senator DeConcini are taken from extensive and nearly

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Report which they were correcting was clearly limited to Section 547(c)(1). Petitioner's view of those comments holds the two floor managers to the unreasonably high standard of having to negate expressly that which they have negated by omission. *See Johnson v. Home State Bank*, ___ U.S. ___, 111 S.Ct. 2150, 2156 (1991) (indicating that "expressly enumerated exceptions [are] presumed to be exclusive").

The legislative history does not address the precise issue in the Question Presented. The plain language of Section 547(b) and (e), together with reference to applicable state law (which reference the legislative history supports), clearly mandates a date of honor rule. Any attempt to boot-strap legislative comments made in context of and expressly limited to other statutory subsections to the issue at hand clearly is inappropriate.

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identical statements regarding the version of the Bankruptcy Reform Act of 1978 that emerged from Conference Committee. *Compare* 124 Cong. Rec., *supra*, H 11089-115, with 125 Cong. Rec., *supra*, S 17406-32. In those statements, the two floor managers exhaustively treated the numerous revisions to the pending bill and to the prior legislative history down to some very minute details. If there had been any intent to extend a transfer on delivery approach any further beyond subsection (c)(1) than subsection (c)(2), these carefully crafted statements clearly could have included the extra clause or sentence necessary to express such an intent. The silence as to Section 547(b) should be fatal to Petitioner's position.

IV. POLICY ARGUMENTS SUPPORT THE CONCLUSION THAT A TRANSFER BY CHECK OCCURS WHEN THE CHECK IS HONORED.

Petitioner identifies four relevant congressional policies underlying Section 547: equality of distribution among similarly situated creditors; conformity with the U.C.C.; conformity with "commercial practice"; and, establishment of uniform bankruptcy laws. Brief of Petitioner at 11, 16-17 and 19. For purposes of Section 547(b), the first two policies clearly support a transfer on date of honor rule; the third policy, when understood in its proper statutory context, is irrelevant to Section 547(b); and, the fourth policy does not affect the analysis of the Question Presented.

A. THE POLICY OF EQUALITY OF DISTRIBUTION IS FURTHERED BY TRANSFER ON DATE OF HONOR RULE.

As previously noted, the primary policy of the entire Bankruptcy Code is to promote equality of distribution among similarly situated creditors. *Begier, supra,* 110 S.Ct. at 2262. In order to facilitate that policy, Congress provided trustees with the power to avoid preferential transfers of an interest of the debtor in property. 11 U.S.C. § 547(b). Upon discharging his burden of establishing the elements contained in Section 547(b), and subject to a defendant's ability to attempt to establish one of the exceptions contained in Section 547(c), a trustee is entitled to recover the interest of the debtor in property transferred. The recovered interest of the debtor in property then becomes part of the Bankruptcy Estate and is

administered for the benefit of the creditors pursuant to the priorities established by Congress. *See* 11 U.S.C. § 507 (setting forth distribution priorities).

Under this regime, the only conceivable relevance that delivery of a check might have is that it might enable the payee, upon appropriate presentment, to receive funds from the drawee bank which would have otherwise been available for the benefit of the other creditors. However, the delivery of a check does not transfer an interest of the debtor in property. Avoidance of whatever transfer may occur when a check is delivered would be a futile act since the Trustee recovers no assets for the estate and the defendant is able to then file a claim for the avoided obligation. *See* discussion at 21-26, *supra.*

The only time a payee of a check is preferred within the meaning of Section 547 vis-à-vis the other creditors is when the check is honored. At that time the funds available to the debtor from the drawee bank are depleted and the goal of equality of distribution among similarly situated creditors is thwarted.

B. THE DATE OF HONOR RULE CONFORMS WITH THE UNIFORM COMMERCIAL CODE.

As discussed above, Section 3-409(1) of the U.C.C. is the operative provision to the Question Presented and clearly provides that a payee does not obtain an interest in any funds which may be available to pay the check unless and until it is accepted by the drawee bank. *See* discussion at 16-19, *supra.* Accordingly, the transfer on

date of honor approach advocated by the Trustee best effectuates the congressional policy of bringing bankruptcy preference law "more into conformity with . . . the Uniform Commercial Code." H.R. Rep. No. 595, *supra*, at 372, *reprinted in Collier, supra*, App. 2 at II-372. Petitioner concedes this point. *See* Brief of Petitioner at 20.

C. COMMERCIAL EXPECTATIONS ARE NOT CLEARLY DEFINED AS TO THE QUESTION PRESENTED AND, IN ANY EVENT, SHOULD BE ADDRESSED IN SECTION 547(c) IF IN CONFLICT WITH THE U.C.C.

Congress clearly identified bringing preference law "more into conformity with commercial practice" as a goal in enacting Section 547. H.R. Rep. No. 595, *supra*, at 372, *reprinted in Collier, supra*, App. 2 at II-372. However, Section 547(b) makes no distinction between those transfers which are commercial in nature and those which are noncommercial. All transactions involving checks, whether entered into in commercial or noncommercial settings, are governed by the provisions of the U.C.C.

In comments limited to subsection (c)(1) and (2), Representative Edwards and Senator DeConcini indicate that a check is a cash transaction. *See* discussion at 26-29, *supra*. It is this legislative history which is apparently the genesis of the view of certain courts that under commercial practice a transfer by check is customarily the date of transfer. *See Young Supply Co. v. McLouth Steel Corp.*, 55 Bankr. 356, 357 (E.D. Mich. 1985), citing *Shamrock Golf Co.*

v. Richcraft, Inc., supra, (which in turn cites the "cash payment" comments by Representative Edwards and Senator DeConcini).

Any categorical statement that commercial practice is to treat a check as a cash transaction is erroneous. There are clearly instances in the commercial world where a check is not viewed as cash and, consequently, is unacceptable as payment. For example, under New Mexico law, title insurance cannot be issued upon delivery of a check drawn on an account of a customer. § 59A-30-5.1 N.M.S.A. 1978 (1991 Supp.)

Additionally, certain Section 547(c) exceptions embody a policy of encouraging trade creditors to deal with troubled businesses. *Bernstein v. RJL Leasing, supra,* 799 F.2d at 634; *Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.),* 850 F.2d 1275, 1280 (8th Cir. 1988). While such creditors may well derive some comfort from certain protections afforded under preference law, such as the ordinary course of business exception codified in Paragraph (c)(2), common sense would certainly suggest that not all such creditors view checks from the troubled businesses as payment upon delivery.

However, to the extent that in commercial settings the expectation is that sometimes payment occurs on delivery, those expectations can best be fulfilled by the Section 547(c) exceptions. Assuming that the comments of Representative Edwards and Senator DeConcini control, a creditor who takes a check for goods delivered or services rendered to a debtor can do so without concern that any vagaries in the bank collection process may result in the

transaction being removed from the safe harbor of the substantially contemporaneous exchange exception found in Paragraph (c)(1).[14]

D. THE POLICY OF HAVING UNIFORM BANKRUPTCY LAWS HAS NOTHING TO DO WITH THE QUESTION PRESENTED.

Petitioner mistakes Congress' ability to promulgate uniform bankruptcy laws and to mandate uniform results for all questions which may come up under bankruptcy laws, with the question of whether Congress has chosen to so exercise its powers as to the Question Presented. *See Butner v. United States, supra,* 440 U.S. at 54. As demonstrated above, Congress exercised its power to create uniform bankruptcy laws to fashion areas of inquiry as to when a transfer is made, but left to state law the ultimate resolution of those questions. Indeed, the legislative history makes clear that Congress contemplated, at least to security interests, that different transfer dates would result depending upon which version of Article 9 of the U.C.C. was applied. S. Rep. No. 989, *supra,* at 89.

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[14] As the issue is not before the Court, the Trustee assumes that the date of delivery would control for the (c) exceptions identified by Representative Edwards and Senator DeConcini. The Trustee does not suggest that this legislative history, even in the context of the specifically identified (c) exceptions, is any substitute for statutory construction, but does note that the result achieved by the date of delivery rule may be able to be reached by close scrutiny of the provisions of those (c) exceptions.

Clearly uniform results under the Bankruptcy Code are not mandated in situations where Congress has left state law to have a controlling influence on the outcome. *Butner v. United States, supra,* 440 U.S. at 54-55. Indeed, in such situations where the outcome may vary depending upon the law of the state, the failure to reach uniform results under the Bankruptcy Code "serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy' ". *Id.* at 55, quoting *Lewis v. Manufacturers National Bank,* 364 U.S. 603, 606 (1961).

V. THE EASE OF PROOF AND MANIPULATION FACTORS SUPPORT THE TENTH CIRCUIT'S DECISION.

The Trustee is in complete agreement that the ease of proof and manipulation considerations enunciated by the Tenth Circuit in its decision below are no substitute for statutory construction in determining the outcome of this case. *See* Brief of Petitioner at 22-23. Indeed, the Trustee would be most surprised if the Tenth Circuit viewed these factors as determinative. The Tenth Circuit, in discussing these factors, was responding to the Sixth Circuit's similar discussion when advocating a date of delivery rule. *Compare* (App. to Petition at 10A-11A); with, *Official Unsecured Creditors Committee v. Shaler Corp. (In re Belknap, Inc.),* 909 F.2d 879, 882 (6th Cir. 1990).

However, Petitioner's criticisms of the Tenth Circuit's treatment of the manipulation points are not well

founded. Petitioner's first contention is that the ability to manipulate the date of transfer is not relevant since the date of honor can be manipulated by "a knowledgeable debtor." Brief of Petitioner at 23. Petitioner's argument seems to be essentially that since the date of transfer can be manipulated under either rule, manipulation cannot be a factor. However, Petitioner does not directly quarrel with the Tenth Circuit's sensible conclusion that a date of honor is less subject to manipulation than a date of delivery rule. *See also Kupetz v. Elaine Monroe Associates, Inc., supra,* 825 F.2d at 202 (acknowledging the propensity for abuse under the date of delivery approach).

Petitioner then adopts the Sixth Circuit's puzzling contention that under a date of honor rule a drawee bank "which is also a creditor and which has inside knowledge of the debtor's financial condition" can manipulate the date of transfer under a date of honor rule "thereby bringing transactions within a 90 day period that ordinarily would not have constituted preferential transfers." Brief of Petitioner at 23, citing *Official Unsecured Creditors Committee v. Shaler Corp., supra,* 909 F.2d at 882. First, the Trustee has substantial reservations about imputing this sort of prescience to drawee banks. The Trustee submits that even with "inside knowledge" there are very few such drawee banks that will know the exact date which the debtor will file its bankruptcy petition more than 90 days prior to the filing and thereby have any ability to predict what transfers can be delayed so as to be brought within the 90 day period.

Second, even assuming such foreknowledge, such a bank would almost certainly setoff against the debtor's account, thereby capturing all of the funds in the account

available to pay its debt rather than paying the money to a third party. By manipulating the date of transfer as Petitioner suggests, a bank merely would be creating the potential that the transfer would be avoided as a preference and, if that potential was realized, would share any funds recovered on a pro rata basis with other unsecured creditors. Surely any bank that would engage in such devious tactics would attempt to obtain the full benefit of those funds through setoff rather than magnanimously creating a situation where it might share those funds pro rata with other creditors if those funds were ever recovered.

Finally, the Sixth Circuit's approach completely ignores the drawee bank's legal responsibility to pay an item presented by the "midnight deadline" unless the drawee bank has returned the item or sent written notice of dishonor or nonpayment. U.C.C. §§ 4-301 (setting forth the drawee's responsibility) and 4-104(h) (defining the midnight deadline as "midnight on [the bank's] next banking day following the banking day on which it receives the relevant item"). The only excuses for delay are expressly set forth in U.C.C. Section 4-108. Thus, even if a drawee bank had the knowledge and inclination necessary to manipulate the date of transfer to create a preference, any payment delayed beyond the midnight deadline renders the bank liable for the amount of the item unless it has some valid defense. U.C.C. § 4-302(a). *See also* 12 U.S.C. § 4002 (containing the expedited funds availability schedules).

Overall, although perhaps not foolproof, a date of honor approach is much better suited to prevent manipulation of the date of transfer than a date of delivery approach.

CONCLUSION

All formulations of the date of delivery approach of which the Trustee is aware concede the necessity of the check being honored. For instance, although not clearly articulated, Petitioner would apparently have this Court adopt the position that a transfer occurs on delivery "if the check is ultimately honored." Brief of Petitioner at 21. Thus, whatever legal significance a date of delivery may have or may acquire once the check is honored, no transfer of an interest of a debtor in property is made unless and until the check is honored.

The decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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